IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1490 OF 2007

Niren Dharma Nikam ...Petitioner

vs.

The State of Maharashtra & Ors. ...Respondents

Mr.Prabhakar Jadhav for the Petitioner
Ms Vaidehi Mhaispurkar,A.G.P. for State
Mr.S.G.Karandikar for Respondent No.4.

CORAM: A.S.OKA,J.
DATE : JUNE 15, 2007.

P.C.:

1. Heard Advocate for the Petitioner, the Advocate for the Respondent No.4 and the learned A.G.P. for Respondent Nos.1 to 3. Considering the controversy involved in the Petition, taken up for final hearing at the stage of admission.

2. A notice under section 4 of the Bombay Government Premises (Eviction) Act,1955 was issued to the Petitioner calling upon the Petitioner to show cause as to why he should not be evicted from the disputed tenement. After holding an enquiry, the second respondent passed an order of eviction on 20th March 2006. An Appeal was preferred by the Petitioner for challenging the order of eviction. The said Appeal was dismissed for default by order dated 6th December 2006. On 12th January 2007, a Notice of Motion was taken out by the Petitioner for restoration of the Appeal. The said Notice of Motion has been dismissed by order dated 16th January 2007 passed by the learned Principal Judge of the City Civil Court.

3. Various submissions have been made by the Advocate for the Petitioner. He pointed out that the Notice of Motion for restoration of the Appeal was taken out within a reasonable time. He referred to the averments made in the Affidavit. He submitted that the court has taken a hypertechnical view of the matter and has declined to restore the Appeal. He pointed out that the Petitioner has been dispossessed. However, the premises are locked and the premises are not yet handed over to the fourth Respondent. He, therefore, submitted that the Appeal deserves to be restored and till the disposal of the Appeal, possession deserves to be restored. The learned A.G.P. for Respondent Nos.1 to 3 opposed the submissions by pointing out that the Petitioner has no right in respect of the premises in question and the learned Judge was justified in not restoring the Appeal.

4. The Advocate for the fourth Respondent submitted that originally one Smt.Baijabai Gaikwad was the tenant in respect of the premises and on her demise on the application was made by the fourth Respondent, the tenancy in respect of the premises was transferred in favour of the fourth Respondent. He submitted that a civil suit was filed by the Petitioner for declaration that the transfer of tenancy in favour of the fourth Respondent was illegal. He stated that the said suit has been dismissed on merits. He pointed out that though an Appeal against the decree passed in the suit has been admitted, there is no interim relief granted in favour of the petitioner in the said Appeal.

5. I have carefully considered the submissions. On 6th December 2006, the learned Principal Judge of the City Civil Court dismissed the Appeal filed by the Petitioner for default by recording that on three earlier dates, none appeared for the Petitioner. In the Affidavit in support of the Notice of Motion, it is alleged that on 24th November and 30th November the Advocate appointed by the Petitioner did not attend the court. It is stated that on 6th December 2006, the Petitioner was not well and therefore, he had informed his Advocate to remain present. However, on that date the Advocate remained absent.

6. The Petitioner had appointed an Advocate to argue his Appeal. The appeal has been dismissed as the Advocate has remained absent. The Appeal has been dismissed as the Advocate appointed by the Petitioner was not present. The Application for restoration was made on 12th January 2007. The learned Principal Judge, in my view, ought to have restored the Appeal.

7. As stated earlier, a declaratory suit filed by the petitioner has already been dismissed and there is no interim relief granted in the Appeal preferred by the petitioner. The finding of the competent authority is that the Petitioner has no right in respect of the premises. The Petitioner has been already dispossessed. However, in view of the ad-interim order passed by this court, the possession of the premises has

not been handed over to the fourth Respondent. Considering the fact that the suit for declaration filed by the Petitioner has been dismissed on merits and considering the finding recorded by the competent authority, possession of the premises cannot be ordered to be restored. However, it is, obvious that even if the fourth Respondent is put in possession of the premises, the said action will be subject to the final outcome of the Appeal.

8. Hence, I pass the following order :

i) Impugned Judgment and order dated 16th January 2007 is quashed and set aside.

ii) Notice of Motion No.116 of 2007 is made absolute in terms of prayer clause (a).

iii) It is made clear that Ad-interim relief which was operating during the pendency of the Appeal is not restored.

iv) It is clarified that even if the possession of the disputed tenement is handed over to the fourth Respondent, the same will be subject to final outcome of the Appeal preferred by the Petitioner.

v) All contentions of the parties in the pending Appeal are expressly kept open.

vi) Writ Petition is partly allowed in above terms. No order as to costs.

JUDGE